LIBRARY
SUPREME COURT, U. S.

FILED
SEP 1 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-179

COTTONWOOD MALL SHOPPING CENTER, INC., a Utah Corporation,
Petitioner,

vs.

UTAH POWER AND LIGHT COMPANY, a Corporation,
Respondent.

BRIEF OF UTAH POWER AND LIGHT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARVIN J. BERTOCH
THOMAS A. QUINN
400 Deseret Building
Salt Lake City, Utah 84111
SIDNEY G. BAUCOM
1407 W. North Temple
Salt Lake City, Utah
Attorneys for Respondent
Utah Power and Light Company

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	6
I - THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS THAT, PETITIONER'S PLAN OF OPERATION WOULD MAKE PETITIONER AN "ELECTRICAL CORPORATION" WITHIN THE MEANING OF SECTIONS 54-2-1 (20) AND 54-4-25 (1) OF THE UTAH CODE ANNOTATED AND WOULD THEREFORE REQUIRE PETITIONER TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, DOES NOT CONFLICT WITH THE LAW OF THE STATE OF UTAH.	6
II - THE DECISION OF THE TENTH CIRCUIT THAT UTAH LAW CAN SUBJECT PETITIONERS PROPOSED PLAN OF OPERATION TO REGULATION WITHOUT VIOLATING THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR SECTION 7 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF UTAH IS NOT IN CONFLICT WITH UTAH LAW.	9
CONCLUSION	14

CASES CITED

Page

Frost v. Railroad Commission, 271 U.S. 583 (1926) 10

Garkane Power Company v. Public Service Commission, 98 Utah 466, 100 P.2d 571 (1940) 8, 11, 14

Medic-Call, Inc. v. Public Service Commission, 24 Utah 2d 273, 470 P.2d 258 (1970) 10, 11, 12, 13, 14

Michigan Public Utilities Commission v. Duke, 266 U.S. 570 (1925) 10

Nebbia v. New York, 291 U.S. 502 (1934) .. 10, 11, 14

Producers Transportation Company v. Railroad Commission of California, 251 U.S. 228 (1920) 10

State ex rel Public Utilities Commission of Utah v. Nelson, 65 Utah 457, 238 P. 237 (1925) 10, 11, 13

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) 10, 11

STATUTES AND RULES

Rule 19, United States Supreme Court 14

Section 54-2-1(20), Utah Code Annotated 1953, (1971 Pocket Supplement) 6, 7

Section 54-2-1(30), Utah Code Annotated 1953, (1971 Pocket Supplement) 12

Section 54-4-25(1), Utah Code Annotated 1953, (1971 Pocket Supplement) 6, 7

CONSTITUTIONAL PROVISIONS

Constitution of the State of Utah, Article I, Section 7 ..... 9, 14

Constitution of the State of Utah, Article I, Section 22 9

United States Constitution, Fourteenth Amendment 9, 14

In the Supreme Court of the United States

OCTOBER TERM, 1971

NO. .....

COTTONWOOD MALL SHOPPING CENTER, INC., a Utah Corporation,
Petitioner,

vs.

UTAH POWER AND LIGHT COMPANY, a Corporation,
Respondent.

BRIEF OF UTAH POWER AND LIGHT COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner owns and operates a shopping center located in Salt Lake County, State of Utah, known as the Cottonwood Mall. This shopping center consists of a complex of stores and buildings surrounding an enclosed mall used by the tenants as a common facility (R. 120)

and by the public as the main promenade between the various offices and stores.

Petitioner owns title to all of the real property and improvements thereon which form the Cottonwood Mall complex. The stores, buildings and offices included in the shopping center are leased by the Petitioner to tenants with the exception of the Eldredge Furniture Company Building which is being purchased under a Uniform Real Estate Contract by W. J. Eldredge Company. (R. 116-118). This building is occupied by the Eldredge Furniture Company and two (2) lessees from Eldredge: Morgan Jewelry Company and Ex-Cel-Cis Beauty Salon. (R. 254).

On or about June 15, 1961, Petitioner and Respondent entered into a written agreement pursuant to which Respondent was to provide underground electrical service to the Cottonwood Mall Shopping Center and assume certain costs in connection with the construction of an underground primary and secondary electrical distribution system. (R. 63-66). In order to perform that agreement, Respondent has expended a total of $1,280,000, approximately $558,000 of which was incurred for the express purpose of providing electrical service to the Cottonwood Mall. The additional $724,000 of expenses incurred by Respondent to serve the Cottonwood Mall represents the cost of the supporting generating and transmission equipment. By 1969 Respondent was, and now is, serving approximately 70 customers at the mall. If Respondent were to lose all of its customers at the Cottonwood Mall theidlin g of its capital investment devoted to serving the Mall would result in an annual loss in gross revenues of $227,000.

In September of 1964, at the request of Petitioner's agent, Respondent installed additional facilities for the express purpose of providing service to a proposed new J. C. Penney Company Store. (R. 70-75). That store was completed in 1969, and Respondent now serves it pursuant to written contract.

Respondent is a public utility, offering electrical service to its customers in Salt Lake County pursuant to various franchises and certificates of public convenience and necessity. (R. 101-102). Petitioner does not have a certificate of public convenience and necessity to furnish electrical service in any locale. In 1969, after the Respondent's expenditure of $1,280,000 to serve the Mall customers, Petitioner installed a total energy unit at the Cottonwood Mall and seeks to compete with the Respondent in supplying electrical power for use at the shopping center.

In addition to the tenants of the Cottonwood Mall the facilities of the Mall are utilized by the following categories of persons:

(1) The general public attracted to the Mall in large numbers for general shopping purposes. (R. 307).

(2) Promoters and other personnel connected with the so-called "traffic building events" held at the Mall such as automobile shows, charity bazaars, art shows, Indian dancers, traveling circus, dolphin show . . . etc., (R. 166, 178-186, 242, 243), held when the stores and offices at the Mall are open for business.

(3) The general public attracted to the Mall to attend or view those events.

(4) The general public which attends school dances, Easter Sunrise Services, church dances, square dances, regular Sunday church services, firemen's social, Chevrolet Show. These activities are held when the stores or offices at the Mall are not open for business and are not considered by the Manager of the Cottonwood Mall Merchants Association to be traffic building events. (R. 166-175, 177, 180, 185).

(5) The general public attracted to the Mall to shop at Eldredge Furniture Company or its lessees, Morgan Jewelry Company and Ex-Cel-Cis Beauty Salon.

(6) The management and employees of Eldredge Furniture and its sub-lessees who use the Cottonwood Mall facilities directly and benefit from their use by the general public.

As it is formulated in the second amended series of pleadings (R. 84, 97 and 125) the present controversy, as presented to the trial court, can be summarized as follows:

(1) Plaintiff (Petitioner) contends Defendant (Respondent) has; (a) by certain specific acts, attempted to monopolize the market for electrical power at the Cottonwood Mall, and (b) interfered with an allegedly existing contract providing for the sale of electrical power by Petitioner to J. C. Penney Company for its store at the Cottonwood Mall;

(2) Defendant (Respondent) generally denies Petitioner's claims and alleges that: (a) Respondent is providing electrical power to the tenants at the Cottonwood Mall pursuant to existing agreements between Re-

spondent and Petitioner and between Respondent and various tenants of the Cottonwood Mall, including J. C. Penney Company; (b) Petitioner seeks to interfere with Respondent's legitimate contractual relationships with the tenants at the Cottonwood Mall including J. C. Penney Company; (c) because of the substantial sums spent by Respondent to provide electrical service to the tenants of Cottonwood Mall at the request of Petitioner, Petitioner is estopped to compete with Respondent in serving tenants of the Mall; (d) Petitioner lacks the necessary certificate of public convenience and necessity to provide electrical service to consumers at the Cottonwood Mall.

Respondent prays for an injunction to prevent Petitioner from damaging or interfering with Respondent's business relationship with its customers at the Cottonwood Mall.

On July 11, 1969, the Lower Court granted Respondent's Motion for Summary Judgment holding that Petitioner's proposal to sell electrical power at the Cottonwood Mall would require Petitioner to first obtain a certificate of public convenience and necessity. Lacking such a certificate Petitioner could not legally sell electrical power at the Cottonwood Mall in competition with Respondent. Therefore, Petitioner was not in a position to complain that Respondent was preventing Plaintiff from competing in the market for electrical energy at the Cottonwood Mall or interfering with its alleged contract to supply power to J. C. Penney Company. (R. 131-136).

Petitioner appealed the Lower Court's decision to the Tenth Circuit Court of Appeals which affirmed the

Lower Court's decision holding: (1) That Petitioner's proposal to provide electrical service to the Cottonwood Mall would bring Petitioner within the definition of an "electrical corporation" contained in Section 54-2-1 (20) of the Utah Code Annotated 1953 (1971 Pocket Supplement) thus requiring Petitioner to first obtain a certificate of public convenience and necessity; and (2) that in so requiring the Utah Statute did not violate the provisions of the Fourteenth Amendment to the United States Constitution or Section 7 of Article I of the Constitution of the State of Utah.

ARGUMENT

I

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS THAT, PETITIONER'S PLAN OF OPERATION WOULD MAKE PETITIONER AN "ELECTRICAL CORPORATION" WITHIN THE MEANING OF SECTIONS 54-2-1 (20) AND 54-4-25 (1) OF THE UTAH CODE ANNOTATED AND WOULD THEREFORE REQUIRE PETITIONER TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY, DOES NOT CONFLICT WITH THE LAW OF THE STATE OF UTAH.

Section 54-2-1 (20) of the Utah Code Annotated 1953 (Replacement Volume 6, 1969 Pocket Supplement) provides as follows:

> "(20) The term 'electrical corporation' includes every corporation, cooperative association and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public service or to its consumers or members for domestic, commercial or industrial use, within this state except where electricity is generated on or distributed by the producer through private property alone, i.e., property not dedicated to public use solely for his own use or the use of his tenants, or by an association of unit owners formed under the 'condominium ownership act,' chapter III, laws of Utah, 1963, [57-8-1 to 57-8-35] and not for sale to others."

Section 54-4-25 (1) of the Utah Code Annotated 1953 (replacement Volume 6, Pocket Supplement) provides in pertinent part as follows:

> "(1) No . . . electric corporation . . . shall henceforth establish or begin construction or operation of a . . . line, route, plant or system . . . without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction. . . ."

The primary question facing both the trial and appellate courts was one of statutory construction. Did Petioner's proposed plan of operation constitute Petitioner an "electrical corporation" within the above definition? Did Petitioner's proposed plan of operation come within the exception to the general definition? Specifically, would Petitioner be furnishing electricity "solely for his own use, or the use of his tenants."

Judge Willis Ritter, the district court judge, considered the case to be one of first impression in the State

of Utah. So, also, did the Appellate Court. Indeed, even Petitioner noted in its brief for the trial court that:

> "Plaintiff (Petitioner) has been unable to find any case contruing an exception similar to the one involved in the case at bar. . . ."

This is confirmed by the fact that Petitioner, in its brief in support of the subject petition, was unable to cite a single decision from Utah or any other jurisdiction, interpreting statutory provisions similar to those involved in this case. The one Utah case cited by Petitioner on this issue is *Garkane Power Company vs. Public Service Commission of Utah*, 98 Utah 466, 100 P.2d 571 (1940). However, since the *Garkane* decision the statute has been changed to broaden the jurisdiction of the Public Service Commission to include every "corporation furnishing electric power . . . to . . . consumers or members. . . ." Thus the *Garkane* case is not applicable. Consequently, on that issue, as posed in this case, there is no existing Utah case law with which the decision of the Tenth Circuit Court of Appeals could conflict.

However, Petitioner argues that the statutory provisions are self-evident, require no interpretation and that the decision of the Tenth Circuit conflicts with the plain meaning of the statute. One trial judge and three appellate judges have agreed that the statute's plain meaning is self evident but that it plainly means something other than the Petitioner claims it means.

In summary, since the decision of the Tenth Circuit is the first decision interpreting the relevant statutory provision, it is tautological to say that the decision cannot be in conflict with Utah law.

II

THE DECISION OF THE TENTH CIRCUIT THAT UTAH LAW CAN SUBJECT PETITIONER'S PROPOSED PLAN OF OPERATION TO REGULATION WITHOUT VIOLATING THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES OR SECTION 7 OF ARTICLE I OF THE CONSTITUTION OF THE STATE OF UTAH IS NOT IN CONFLICT WITH UTAH LAW.

Petitioner asserts that under Utah law and the decisions of this Court, any statute which would subject the Petitioner's proposed plan of operation to regulation by the Public Service Commission of the State of Utah would violate the due process provisions of the Fourteenth Amendment of the Constitution of the United States[1] and Section 7 of Article I of the Constitution of the State of Utah[2] and would constitute a taking of private property without just compensation in violation of Section 22 of Article I of the Constitution of the State of Utah.[3]

It is idle to discuss the taking of private property without just compensation issue for two reasons: (1) It was not raised on appeal to the Tenth Circuit and thus is not properly before this Court, and (2) Petitioner neither cited cases nor made argument in support of his position on that issue.

With respect to Petitioner's due process argument,

---

[1]Set out in Petitioner's Brief.
[2]Set out in Petitioner's Brief.
[3]Set out in Petitioner's Brief.

it is significant that all of the United States Supreme Court Cases cited for Petitioner, [*Producers Transportation Company v.Railroad Commission of California*, 251 U.S. 228 (1919); *Michigan Public Utilities Commission v. Duke*, 266 U.S. 570 (1925); *Frost v. Railroad Commission*, 271 U.S. 583 (1926)], predate the due process cases cited and quoted by the Tenth Circuit in support of its decision on this issue; [*Nebbia v. New York*, 291 U.S. 502 (1934) and *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)]. The latter decisions make it obvious that, rather than being in conflict with the decisions of this Court, the opinion of the Tenth Circuit is in harmony with the principle of law well established by this Court to the effect that State laws which have a reasonable relation to a proper legislative purpose and are neither discriminatory nor arbitrary are in accord with the requirements of due process. Certainly, a state statutory scheme which requires all "electrical corporations" to obtain certificates of public convenience and necessity would clearly have a reasonable relationship to a proper legislative purpose, i.e., the provision of dependable, efficient electrical service and the avoidance of costly duplication of electrical power facilities and services at the expense of the rate-paying public.

Notwithstanding the foregoing, Petitioner cites two cases which assertedly stand for the proposition that under Utah law the Legislature cannot "by mere legislative fiat" convert a private business into a public utility [*State ex rel Public Service Utilities Commission of Utah v. Nelson*, 65 Utah 457; 238 P. 237 (1925), and *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970)]. Petitioner contends that

any statute so construed would violate the concepts of due process.

As authority for Petitioner's positions, the *Nelson* and *Medic-Call* cases have serious deficiencies:

(1) The Nelson decision (1925) dates from a time prior to this Court's decision in *Nebbia v. New York* (1934) in which this Court said:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislatuve purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, . . ."

1925 represents a period when it was still common for courts to utilize the concept of due process to strike down state laws, regulatory of business and industrial conditions [*Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)]. In the *Williamson* case this court said:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with particular school of thought."

(2) In *Garkane Power Company v. Public Service Commission*, 98 Utah 466 (1940), the Utah Supreme Court cited the *Nebbia* decision with approval and in so

doing recognized that a private business could be "affected with a public interest" (*Id.* at 472) and therefore subject to regulation.

(3) A careful reading of *Medic-Call, Inc. v. Public Service Commission*, 24 Utah 2d 273, 470 P.2d 258 (1970) reveals that, contrary to Petitioner's argument, the Court did not hold that the Utah Legislature cannot subject private business to regulation by the Utah Public Service Commission. In order to appreciate the true significance of the *Medic-Call* decision, it is essential to understand that "telephone corporations" and "electrical corporations" receive different treatment in the Utah statutory scheme. Section 54-2-1 (30) of the Utah Code Annotated 1953 (Replacement Volume 6, 1969, Pocket Supplement) provides in pertinent part as follows:

> "The term 'public utility' includes every . . . electrical corporation, telephone corporation . . . where the service is performed for, or the commodity delivered to, *the public generally, or in the case of a gas or electrical corporation, where the gas or electricity is sold or furnished to any member or consumers within the state of Utah,* for domestic, commercial or industrial use. And whenever any . . . electrical corporation, telephone corporation . . . performs a service for or delivers a commodity to the public; or in the case of a gas corporation or electrical corporation selling or furnishing gas or electricity to any member or consumers within the state of Utah, for domestic, commercial or industrial use, for which any commercial or industrial use, for which any compensation or payment whatsoever is received, such . . . is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title.". (Emphasis added.)

Note that in Utah, a "telephone corporation" must perform a service for the "public generally" before it is defined as a public utility. On the other hand, an "electrical corporation" need only furnish a service or commodity to a "member or consumers" in order to be defined as a public utility. In view of this statutory context, the Utah Supreme Court concluded that a physician's pocket radio paging service, available only to a limited number of licensed physicians who were members of a nonprofit association, was not a public utility and thus not subject to regulation by the Public Utility Commission. In so holding the Court stated:

> "In holding that the Commission had no authority to regulate the business of Nelson, this Court said at Page 462 of the Utah Reports, 238 P. at Page 239:
>
> > 'No one may successfully contend that it is competent for the Legislature to regulate and control in such respect a mere private business or to declare a private business to be public service or a public utility. In other words, the state may not, by mere legislative fiat or edict, or by regulating orders of a commission convert mere private contracts or a mere private business into a public utility or make its owner a common carrier. So, if the business or concern is not public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission. * * *' " (*Medic-Call, Inc. v. Public Service Commission*, supra at 275.)

In this context, the Utah Court appears to be saying not that the Legislature cannot subject private business to regulation by the Commission, but rather, that

the Commission cannot assert jurisdiction without statutory authority. Certainly, this is the only possible interpretation of the *Medic-Call* decision which is consistent with the prior decision of the Utah court in *Garkane* and this Court's decision in *Nebbia* and the numerous cases following that line of authority.

In summary, the Tenth Circuit decision that the applicable Utah statutes, as interpreted, did not violate provisions of either the Fourteenth Amendment to the United States Constitution or Section 7 of Article I of the Constitution of the State of Utah, is not in conflict with the opinions of this Court or of the Courts of the State of Utah.

CONCLUSION

Since the opinion of the Tenth Circuit does not conflict with the law of the State of Utah, and no other reasons in contemplation of this Courts' rule 19 have been put forth by Petitioner for granting certiorari, the subject petition should be denied.

Respectfully submitted,

MARVIN J. BERTOCH
THOMAS A. QUINN
400 Deseret Building
Salt Lake City, Utah 84111

SIDNEY G. BAUCOM
1407 W. North Temple
Salt Lake City, Utah

Attorneys for Respondent
Utah Power and Light Company